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No. 820

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. M. LASSING, H. A. THOMPSON, SR., MARSHALL O. THOMPSON, MRS. J. R. HANSON, MRS. RICHARD C. PATRICK, SR., AND H. A. THOMPSON, JR., D/B/A CONSUMERS GASOLINE STATIONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
FREDERICK U. REEL,
VIVIAN ASPLUND,
Attorneys,
National Labor Relations Board,
Washington 25, D.C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on December 17, 1960.

OPINIONS BELOW

The decision of the Court of Appeals (Appendix A, *infra*, pp. 13–16) is reported at 284 F. 2d 781. The findings of fact, conclusions of law and order of the Board (J.A. 2a–9a) [1] are reported at 126 NLRB 1041.

[1] References designated "J.A." are to the pages of the joint appendix before the court below, containing portions of the record in this proceeding.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra*, p. 16) was entered on December 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer, who has been found to have closed a department of his business and discharged the employees working there for the purpose of avoiding bargaining with the employees' representatives, may secure reversal of National Labor Relations Board decision finding him guilty of unfair labor practices by pointing to evidence of his belief that the advent of the union would make further operation of the department uneconomical.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The respondent, Consumers Gasoline Stations, is a partnership operating an independent chain of retail gasoline and service stations in Tennessee and Ken-

tucky (J.A. 10a–11a; 57a, 69a). Beginning in August, 1958, and continuing throughout the fall and early winter, the respondent had considered and studied the problem of whether it should continue to truck gasoline particularly in the light of mounting costs and what it deemed to be inadequate equipment (J.A. 12a; 58a–60a, 72a–74a). In December, the repondent decided to adopt a common carrier system of gasoline delivery as soon as anything occurred which would increase costs and, in any event, when the truck licenses expired on April 1, 1959 (J.A. 12a; 58a–59a, 74a).

Sometime during the latter part of 1958, three of the respondent's four drivers—Billy Head, Ned Warren, and Newell Wyatt—became interested in representation by the Union.[2] In mid-December, Wyatt called the Union, and on January 1, 1959, the three drivers signed designation cards which they gave to Ralph Vaughn, a Union business representative (J.A. 13a; 49a). On January 13, Vaughn wrote the respondent, requesting recognition and a meeting for the purpose of negotiating a collective bargaining agreement. The date suggested for such meeting was January 16 (J.A. 13a; 49a, 31a). The respondent promply acknowledged the letter and suggested that the parties get together on January 23 or 26. Finally, January 20 was set as the meeting date (J.A. 13a; 49a, 32a).

Shortly after the respondent received the letter requesting recognition, Office Manager Hanson asked

[2] Teamsters, Chauffeurs, Helpers & Taxicab Drivers Local Union No. 327, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

Wyatt if he knew anything about it. Wyatt replied that he, Warren, and Head had joined the Union. When asked about Joe Savage, the fourth driver, Wyatt told Hanson that he did not think Savage had signed up. During this conversation, Hanson threatened, "We'll sell out to Refiners first" (J.A. 13a, n. 4; 41a).

On January 19, the day before the date scheduled for bargaining to begin, Office Manager Hanson instructed the drivers not to report at their customary starting time the following morning but, instead, to report to the office at 8:30 a.m. When all four drivers arrived at the office on January 20, the respondent gave three of them, Head, Warren, and Wyatt, their separation notices and final checks, and told them that the respondent was going to contract with a common carrier to transport the gasoline (J.A. 14a; 41a, 45a). The three drivers thereupon left and have not since been in the respondent's employ (J.A. 14a; 39a, 44a–45a).

When the Union and the respondent met later that morning, the Union renewed its request for recognition. The respondent refused, announcing that it had for a time contemplated abandoning its method of shipping gas and that the coming of the Union, with the added payroll expense which the respondent anticipated therefrom, was, in effect, the straw that broke the camel's back (J.A. 13a–14a; 68a). The respondent had been paying its drivers $1.30 per hour (J.A. 15a; n. 7). The Board found, on the basis of undisputed testimony, that the Union had contracts with other employers under which the drivers received a similar

rate of pay, and that the Union's wage demands vary and are adapted to local and individual plant conditions (J.A. 17a; 51a, 52a).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon these facts, the Board concluded that the respondent accelerated the change in its method of operation because the drivers had joined the Union, and to avoid its statutory obligation to bargain with the Union. Accordingly the Board held that the respondent violated Section 8(a) (3) and (1) of the Act when, on January 20, it discharged Head, Warren, and Wyatt. The Board also found that, as the Union represented a majority of the drivers prior to the discriminatory dismissals, the repondent was obligated to bargain on request, and its refusal to do so violated Section 8(a)(5) and (1) of the Act (J.A. 3a).

The Board ordered the respondent to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining or coercing employees in the exercise of their statutory rights (J.A. 5a–6a).

In determining what affirmative action would best effectuate the policies of the Act, the Board did not direct reinstatement of the men as truck drivers, recognizing that, prior to the advent of the Union, the respondent had decided to discontinue its trucking operation on April 1, 1959. As the Board was unable to determine from the record whether it was the respondent's policy to offer reassignment to employees dismissed for economic reasons, it left to the compliance stage of the proceeding the ascertainment of the existence of such policy. If reassignment

proved to be the practice, the respondent was directed to offer Head, Warren, and Wyatt the jobs to which they would have been transferred; otherwise the respondent was directed to bargain as to whether these three men might, nevertheless, be employed somewhere in its organization (J.A. 4a–5a, 6a).

Further, the Board's order required the respondent to make Head, Warren, and Wyatt whole for losses suffered as a result of the discrimination against them[3] and to post appropriate notices (J.A. 6a–7a).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals refused to enforce the Board's order, concluding that the respondent's change in operations was made "because of reasonably anticipated increased costs, regardless of whether [the] increased costs [were] caused by the advent of the Union or by some other factor entering into the picture" (*infra*, pp. 15–16). The court also stated that, "Although the Union had made no demand for increased pay, the evidence fully justified respondent's belief that such demands would be made and could not be met. Under the circumstances, we do not believe it was incumbent upon the respondent to delay the effective date of its new method of operation previously decided upon before the advent of the Union" (*infra*, p. 15). Having found that the discharges were nondiscriminatory, the court found that "there was no

[3] Back pay was to run from the date of the discharge to the date reassignment was offered or to April 1, 1959, depending upon whether a reassignment practice existed (J.A. 4a-5a, 6a-7a).

basis for a meeting with the Union later for the purpose of collective bargaining" (*infra*, p. 16).

REASONS FOR GRANTING THE WRIT

1. The question presented by this case is important in the administration of the National Labor Relations Act. The number of cases in which employers seek to justify their action on the ground that it is motivated entirely by economic necessity seems to be increasing. In many situations the action of employers which has the practical effect of frustrating collective bargaining or discriminating against employees who have exercised rights protected by the Act may be judged a normal business decision or an unfair labor practice, depending upon the employer's motives. Obvious examples are changes in working conditions, transfers of activity from one locality to another, or the subcontracting of work which had previously been performed directly. The flexibility and mobility of American industry, except very small business, has made it possible to move plants or to open or close portions of plants in a manner which drastically affects the interests of employees. Whether such action constitutes an infringement of the employee's rights under the National Labor Relations Act or is merely an exercise of managerial discretion, entirely independent of the employer's labor policies, must be determined by the Board by weighing all the evidence with respect to the employer's motives.

The decision below rejects the conclusion of the Board that the employer's decision not to operate its own trucks between January 20 and April 1 was motivated by a determination to avoid collective bar-

gaining and to discriminate against employees who had joined a union. The court rejected this conclusion while leaving untouched the underlying factual findings upon which the conclusion was based. If the decision is viewed merely as a holding with respect to the standard to be followed in judicial review of an administrative finding, it is a sharp departure from the standard of review established by this Court in *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 488. The National Labor Relations Board's findings were certainly supported by the evidence in the record as a whole, and it was not the function of the reviewing court to "displace the Board's choice between two fairly conflicting views * * *."

The sequence of decisions in the Court of Appeals for the Sixth Circuit, however, makes it appear that that court has in practice adopted a rule of law that it will reverse a finding by the Board of illegal motivation whenever an employer can point to preexisting facts which might have supplied an economic motive for his action. Here, for example, the Board's finding that the subcontracting of the gasoline transport activity was motivated by a desire to avoid bargaining with the representatives chosen by the truck drivers was reversed because the employer had previously decided to subcontract this work at a later date. The court disregarded, as if legally irrelevant, the abundant evidence that the employer advanced the date as soon as he learned that the drivers had joined the union and wished to bargain collectively, evidence which certainly supports the Board's conclusion.

This decision follows earlier Sixth Circuit cases taking the same approach. In *National Labor Rela-*

tions Board v. *R. C. Mahon Co.*, 269 F. 2d 44, the Board found that the employer discriminated against employees and avoided bargaining with their representatives by discharging its plant guards and contracting with an outside agency to perform the service. The court there, as here, reversed the Board's findings on the ground that the action was justified by the need of the employer to effect economies despite the ample evidence before the Board to justify its findings that union activity precipitated the employer's decision. Earlier still, the same court had reversed the Board in a case where the employer had terminated a service department established to maintain its trucks rather than meet a demand for union wages. *National Labor Relations Board* v. *Adkins Transfer Co.*, 226 F. 2d 324. (This case differs from the later ones in that the employer had bargained with the representatives of the employees, so that no question of a Section 8(a)(5) violation was involved.)

2. The decision of the court below is in conflict with the recent action of the Court of Appeals for the Tenth Circuit in *National Labor Relations Board* v. *Brown-Dunkin Co.*, decided January 19, 1961.[4] That case involved a department store's decision to subcontract for janitorial services previously performed by its own employees. The court stated (App. B, *infra*, p. 21):

> * * * The crucial and decisive fact is whether, as the Board found, the work of the employees was subcontracted to another in order to evade the collective bargaining process. The Company may not discontinue a part of an integrated operation merely because the em-

[4] The opinion of that court is reprinted in Appendix B, *infra*, pp. 17–24.

> ployees engaged in the particular unit seek Union representation. In circumstances like these, motivation becomes important, indeed decisive, and, again, permissible inferences from the established facts are crucial. And, as we know, the inference-drawing power is with the Board, and our function is to determine if there is any rational basis for attributing a prohibited motive to the transaction.

See also *National Labor Relations Board* v. *Cape County Milling Co.*, 140 F. 2d 543, 545 (C.A. 8), and *Williams Motor Co.* v. *National Labor Relations Board*, 128 F. 2d 960, 964 (C.A. 8). The importance of this conflict in approach between the two circuits is increased by the fact that two other cases involving similar factual situations are now pending in other courts of appeals. *Yoseph Bag Co.*, 128 NLRB No. 21, petition for review, C.A. 3, Nos. 13358 and 13406; *Jay Foods, Inc.*, 129 NLRB No. 70, petition for review, C.A. 7, No. 13308.[5]

3. Finally, the Board's application of the Act to the facts found was clearly correct. It is not disputed that the Union represented a majority of the truck drivers and had demanded recognition at the time the respondent discontinued the trucking operation. This Court's decision in *Order of Railroad Telegraphers* v. *Chicago & Northwestern R. Co.*, 362 U.S. 330, 342, indicates that the respondent was therefore under a statutory duty to bargain with the Union con-

[5] *National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848 (C.A. 5), is distinguishable, for there, unlike here, there was no finding that the employer had accelerated the shutdown of the operation because of the advent of the union; rather, the finding was that the shutdown had been decided upon previously, and the men had joined the union in an effort to prevent it (at pp. 852–853).

cerning the discontinuance of the work. The respondent, to say the least, put the cart before the horse in discharging the men because it feared the Union's demands, and then cancelling the first bargaining session on the ground that the men the Union represented were no longer the respondent's employees. If the respondent had fulfilled its bargaining obligation under the Act, the discharges need not have occurred, for the respondent might have learned that the Union would follow the practice of adjusting its wage demands to the needs of the employer's business (see p. 5, *supra*), and, in any event, the respondent was still free to decline any wage increase the Union demanded. See *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152, and materials there cited in notes 4 and 5, showing that collective bargaining may lead to a union's abandoning wage demands and even to its accepting wage cuts.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
FREDERICK U. REEL,
VIVIAN ASPLUND,
Attorneys,
National Labor Relations Board.

MARCH 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. M. LASSING, H. A. THOMPSON, SR., MARSHALL O. THOMPSON, MRS. J. R. HANSON, MRS. RICHARD C. PATRICK, SR., AND H. A. THOMPSON, JR., D/B/A CONSUMERS GASOLINE STATIONS, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided December 17, 1960

Before MARTIN, MILLER and WEICK, Circuit Judges.

PER CURIAM. The National Labor Relations Board seeks enforcement of its order of March 8, 1960, based upon its finding that respondent had violated Section 8(a) (1) and (3) of the Act by discharging three employees because they had joined the Union, and had violated Section 8(a) (1) and (5) by refusing thereafter to bargain with the Union.

The respondent is a partnership operating an independent chain of retail gas and service stations in Tennessee and Kentucky. During the latter part of 1958 it had considered and studied the problem of whether it should continue to truck gas with its own equipment and employees, particularly in the light of mounting costs and what it deemed to be inadequate

equipment, and had decided to adopt a common carrier system of gas delivery as soon as anything occurred which would increase costs and, in any event, when the truck licenses expired on April 1, 1959.

On January 1, 1959, three of respondent's drivers joined the Union. The Union requested recognition and a meeting for the purpose of negotiating a collective bargaining agreement. A meeting was arranged for January 20, 1959. On January 19, 1959, the drivers were instructed to report at the respondent's office at 8:30 A.M. When they arrived respondent told them that it was going to contract with a common carrier to transport the gasoline and gave the three drivers herein involved their separation notices and final checks. The three drivers thereupon left and have not since been in respondent's employ.

When the Union and respondent met later that morning, the Union renewed its request for recognition. Respondent refused, announcing that it had for a time contemplated abandoning its method of shipping gas and that the coming of the Union, with the added payroll expense thereby entailed, was, in effect, the straw that broke the camel's back.

This case presents basically the same question considered by this Court and decided adversely to the Board's contention in *N.L.R.B.* v. *Adkins Transfer Co.*, 226 F. (2) 324, C.A. 6th, and *N.L.R.B.* v. *R. C. Mahon Co.*, 269 F. (2) 44, C.A. 6th. We there held that a company may suspend its operations or change its method of doing business, with the resulting loss of employment on the part of certain employees, so long as its change in operations is not motivated by the illegal intention to avoid its obligations under the National Labor Relations Act. A change in operations motivated by financial or economic reasons is not an unfair labor practice under the Act.

The Board contends that this case is not controlled by the ruling in the *Adkins* and *Mahon* cases because the respondent accelerated its proposed change in operations upon its learning that the three employees had joined the Union and before any demands for increased pay for said employees had been made upon it by the Union, and that such action constituted the discrimination found by the Board to exist.

We do not agree. Although the Union had made no demand for increased pay, the evidence fully justified respondent's belief that such demands would be made and could not be met. Under the circumstances we do not believe it was incumbent upon the respondent to delay the effective date of its new method of operation previously decided upon before the advent of the Union. It will be noticed that the respondent's decision to change its method of operation did not include a commitment to continue under its existing method of operations until April 1, 1959. That date fixed the maximum period of time which would elapse before the change would become effective. The respondent had decided to make the change effective before that date if anything occurred which would increase its costs. The advent of the Union was a new economic factor which necessarily had to be evaluated by the respondent as a part of the overall picture pertaining to costs of operation. It is completely unrealistic in the field of business to say that management is acting arbitrarily or unreasonably in changing its method of operations based on reasonably anticipated increased costs, instead of waiting until such increased costs actually materialize.

There is no evidence in the present case, and there is no contention made, that there was any anti-union background on the part of the respondent. Fundamentally, the change was made because of reasonably

anticipated increased costs, regardless of whether this increased costs was caused by the advent of the Union or by some other factor entering into the picture. This did not constitute discrimination against the three employees with respect to their tenure of employment because of membership in the Union, within th provisions of Section 8(a) (1) and (3) of the Act. *N.L.R.B.* v. *Houston Chronicle Pub. Co.*, 211 F. (2) 848, 854, C.A. 5th.

Since that division of the respondent's business was discontinued and the employment of the three drivers legally terminated, there was no basis for a meeting with the Union later for the purpose of collective bargaining. *N.L.R.B.* v. *Houston Chronicle Pub. Co.*, supra.

Enforcement of the Board's order is denied.

JUDGMENT

December 17, 1960

On Petition to enforce an order of the National Labor Relations Board.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, it is now ordered, adjudged and decreed by this Court that Enforcement of the Board's order be and the same is denied.

Approved for entry:

(S) SHACKELFORD MILLER, JR.,
United States Circuit Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Filed: Jan. 19, 1961

January Term—1961

Number 6402

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

BROWN-DUNKIN COMPANY, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before MURRAH, Chief Judge, and BRATTON and BRIETENSTEIN, Circuit Judges.

MURRAH, Chief Judge.

This petition is to enforce an order of the National Labor Relations Board finding the respondent, a large department store in Tulsa, Oklahoma, guilty of unfair labor practices under Sections 8(a) (1), (3) and (5) of the Labor Relations Act. 29 USC § 158(a) (1), (3) and (5). The respondent is clearly engaged in commerce within the scope of the Act and there is no question of jurisdiction.

The basic facts are that in November 1956, three of the Company's operating engineers joined a union. Following this the Company consulted a labor relations firm and subsequently made an arrangement

with an operating-management firm, Anderson-Rooney Company, whereby the latter agreed to take over, on a contract basis, the employment of the engineers and their duties. The respondent Company agreed to pay all costs of labor and materials, as well as a monthly management fee. At the same time, the matter of Anderson-Rooney taking over the janitorial services performed by respondent's maids and porters was also discussed.

Subsequently when the Company learned that the Teamsters Union was conducting a campaign to organize its employees, it again consulted the labor relations firm. The organizational campaign resulted in the NLRB ordering an election among the Company's maids, porters and elevator operators. And these latter employees comprise the employee-unit with which we are concerned.

During the three-week period between the issuance of the election order and the actual voting, the Company carried out an intensive program to convince the employees that they should reject the Union. Various employees testified that the store supervisors told them they were trying to "straighten out the mess the store was in," and that "management never had dealt with the Union and wouldn't have nothing to do with it." They were also promised pay raises and other benefits if the Union was rejected. Despite these Company activities, the Union was successful and was duly certified as the bargaining representative for the unit.

In response to the Board's 8(a)(1) charge and findings, the Company takes the position that these pre-election and pre-certification activities, though persuasive, were not intended to restrain or coerce employees in the exercise of their collective bargaining rights; and that the supporting evidence is "too

insubstantial to establish a transgression of the limits of permissible free speech."

The Company was, indeed, constitutionally and statutorily free to attempt to persuade its employees not to join the Union, provided, of course, such efforts contained "no threat of reprisal or force or promise of benefit." See Section 8(c) of the Act. 29 USC § 158(c). And the fact that the Company's efforts were unavailing is, to be sure, susceptible of an inference of a permissible expression of "views, argument or opinion." Id. But, the fact that the Company's efforts were unsuccessful does not necessarily lead to the conclusion that they were not restrictive or coercive. *N.L.R.B.* v. *Hill & Hill Truck Line*, 266 F. 2d 883. See also *N.L.R.B.* v. *Beatrice Foods Co.*, 183 F. 2d 726; *N.L.R.B.* v. *Fairmont Creamery Co.*, 169 F. 2d 169. In the last analysis, the function of drawing the rather nebulous line between permissible persuasion and prohibited coercive conduct lies within the special competence of the Board which, as we know, is primarily responsible for the effectuation of the purposes of the Act. It is sufficient to say that the record evidence is susceptible of an inference of coercive interference, and we are therefore unable to say that the Board's conclusions in this respect are unwarranted in fact and law. See *N.L.R.B.* v. *Central Oklahoma Milk Producers Association*, — F. 2d — (10 CA 1960).

Shortly after certification, the Union learned that the Company was considering subcontracting the work of these unit employees to Anderson-Rooney. A meeting of the employees was thereupon called, and they voted unanimously to reject employment with Anderson-Rooney, though it would have meant substantial increases in their wages. The reasons for the rejection are not manifest and are apparently im-

material. In any event, despite objections of the employees and the Union, the Company signed a contract with Anderson-Rooney, whereby the latter would assume the work of the unit employees on a cost-plus-fixed-fee basis.

On the day following the signing of the contract, and without notice to the Union, Anderson-Rooney presented the employees printed forms for the purpose of transferring their employment from respondent-company to the management firm. After consulting the Union, the employees signed the forms under protest, apparently because failure to sign would have resulted in immediate discharge. Upon these facts the Board concluded that respondent violated Section 8(a)(3) of the Act by discriminatorily discharging the employees as a reprisal for their Union activities. It also held the Company in violation of Section 8(a)(5) for failing and refusing to afford the Union the opportunity to bargain concerning the terms and conditions of the new employment. The Board accordingly ordered reinstatement of the employees with Brown-Dunkin, provided however, that they could elect to remain with Anderson-Rooney, in view of the latter's higher wages.

The respondent makes the argument that the order is unconventional and prejudicial in that "this is one of the rare cases in which the Board has ordered an employer to engage in a discontinued business operation." It does not appear to us, however, that such is the true consequence of the Board's order. In the first place, the respondent has not abandoned the services of the unit—the employees continue to discharge the same services. But the Company was free to subcontract the employees' work, thereby severing the employer-employee relationship, so long as the subcontracting was not made a subterfuge or

an easy device for evading the statutory obligations to bargain in good faith. The crucial and decisive fact is whether, as the Board found, the work of the employees was subcontracted to another in order to evade the collective bargaining process. The Company may not discontinue a part of an integrated operation merely because the employees engaged in the particular unit seek Union representation.[1] In circumstances like these, motivation becomes important, indeed decisive, and, again, permissible inferences from the established facts are crucial. And, as we know, the inference-drawing power is with the Board and our function is to determine if there is any rational basis for attributing a prohibited motive to the transaction.

The respondent maintains that the employees were discharged for legitimate reasons. It contends that Anderson-Rooney was contracted because it could perform the same work more economically. It may be assumed that economy is a legitimate reason for good faith subcontracting. But even so, the Board justifiably concluded that the Anderson-Rooney contract did in fact increase the cost of this part of the re-

[1] See *Williams Motor Co.* v. *N.L.R.B.*, 128 F. 2d 960, 964; *N.L.R.B.* v. *Bank of America*, 130 F. 2d 624, 629, cert. denied, 318 U.S. 791; *Butler Bros.* v. *N.L.R.B.*, 134 F. 2d 981, 985, cert. denied, 320 U.S. 789; *N.L.R.B.* v. *Cape County Milling Co.*, 140 F. 2d 543, 546; *N.L.R.B.* v. *Missouri Transit Co.*, 250 F. 2d 261, 262. Cf. *N.L.R.B.* v. *R. C. Mahon Co.*, 269 F. 2d 44, 47 and *N.L.R.B.* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848, 851, where the discontinuance of a part of the business was not prompted by an intention to avoid the Act, but resulted from legitimate business motives. And Cf. *United Steelworkers of America* v. *New Park Mining Co.*, 273 F. 2d 352, wherein the question under Section 301 of the Act was whether subcontracting was a prohibited device for evading the obligations of a consummated collective bargaining contract.

spondent's operations, due to the substantial wage increase as well as the management fee.

The Company also asserts that plans to subcontract to Anderson-Rooney were formulated long before the Union election and therefore cannot be considered violative of the Act. But, the Board held "On this record there can be no question that the successful unionization of these employees precipitated the broadening of the Anderson-Rooney contract, which already covered operating engineers, to include cleaning and elevator personnel, and the discharge by respondent of all employees in the certified unit." This finding is supported by substantial evidence to the effect that even though the contract relating to the operating engineers was in existence prior to the labor difficulties, the successful Union election prompted the discharge of these unit employees in violation of the Act. And discharge for Union activities is the very substance of discriminatory practices prohibited by Section 8(a)(3) of the Act. We conclude that the Board's findings in this regard are factually and legally justified.

The contention is also made that the respondent did not deny the Union the right to bargain concerning the terms and conditions of employment in violation of Section 8(a)(5). The unassailed facts are, however, to the contrary. While the Union appears to have had some intimation of the impending Anderson-Rooney contract, it was not until the morning of the effective date of the contract that the Union learned it had been consummated. And this information was obtained through the employees, not the employer. Under no stretch of the imagination can it be said that these circumstances gave the Union a fair opportunity to bargain with respondent about not subcontracting the work, or with Anderson-Rooney

concerning the conditions of the new employment. This is not to say that the Union must first approve before an employer may contract out work, but it is to say that reasonable notice and a chance to bargain must be afforded before an employer enters into a contract affecting the hire or tenure of its Union workers' employment. This is so because "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Dept. Stores* v. *N.L.R.B.*, 326 U.S. 376, 385. See also *N.L.R.B.* v. *Crompton-Highland Mills*, 337 U.S. 217; *N.L.R.B.* v. *Burton-Dixie Corp.*, 210 F. 2d 199.

The Company's final two contentions are basically matters of procedure. It asserts (1) that the Board's complaint is insufficient because it names some, but not all, of the unit employees and therefore the order cannot issue in favor of the unnamed employees; and (2) that the order is ambiguous and unclear. The essence of the first argument is that in its complaint, the Board named only those employees who had voted in favor of Union representation and omitted those who were in favor of rejecting it. The omission, however, is immaterial because in pertinent parts of the complaint it is specified that all of the employees in the unit were discharged by respondent in violation of the Act. It would be an incongruity and a technical nicety to hold, at this late date, that a part of the unit employees were not included in the complaint when the pleading clearly described the unit and stated that all of the employees therein were treated unfairly. See *N.L.R.B.* v. *Somerset Classics*, 193 F. 2d 613.

The second contention is based upon provisions in the Board's order granting the employees the option to remain with Anderson-Rooney, or be reinstated by Brown-Dunkin. In effect, the choice is between higher wages paid by Anderson-Rooney and purportedly greater job security provided by Brown-Dunkin. But we find nothing inconsistent or arbitrary in the flexibility of the Board's order. Its form and scope is a matter for the Board to mold to the particular facts and circumstances in each case. It is not for us to interfere with this discretionary function in the absence of a showing of clear abuse.

The order will be enforced.

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No. 820

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 820

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. M. LASSING, H. A. THOMPSON, SR., MARSHALL O. THOMPSON, MRS. J. R. HANSON, MRS. RICHARD C. PATRICK, SR., AND H. A. THOMPSON, JR., d/b/a CONSUMERS GASOLINE STATIONS, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Supreme Court should review by certiorari a Court of Appeals decision denying enforcement of an order of the National Labor Relations Board against an employer who was held by the Board to have discriminated against three employees by permanently closing a department and discharging the employees, after unionization of the department, although the employer held no anti-union hostility and had previously determined, for valid economic reasons, to eliminate the department as soon as anything happened to increase its costs, and the employer honestly viewed unionization of the employees as a cost-increasing event.

STATEMENT

Respondent accepts Petitioner's statement of the case with a few exceptions and additions.

The Board made no findings of coercion, interrogation, anti-union hostility or threats.[1] The discharges were not effected in a precipitate or inconsiderate manner. Each driver was given one week's severance pay and was told he would be given recommendations for other employment (J.A. 47a-48a). The conversion to common carriage was fully carried out and Respondent's tractors and trailers were sold (J.A. 22a-23a; 75a).

The basic facts were well summarized by the Board as follows:

> "The findings made above are based upon substantially undisputed testimony. The employer, in its concern over mounting operating expenses, determined for sound economic reason to alter its transport methods before a definite date, or earlier, if unusual expenses occurred. When the Union appeared upon the scene and made its request for recognition as the bargaining representative of the Respondent's drivers, and for a meeting with it to negotiate a collective agreement, the Respondent, correctly or incorrectly, viewed this request as 'the first major expense', the predetermined signal to institute its retrenchment program. Whereupon prompt steps were taken to execute immediately the previously formulated plan to contract to a common carrier the haulage of all gasoline to the service stations." (J.A. 15a)[2]

[1] At page 5 of the Petition it is stated that Respondent's office manager, Hanson, "threatened" the employees with the statement "We'll sell out to Refiners first." Driver Newell Wyatt's testimony concerning this conversation (J.A. 41a) was specifically considered by the Trial Examiner, who concluded that it could *not* be considered as evidence of a possible violation of the Act (J.A. 13a, n. 4).

[2] The word "viewed" in the 10th line of this statement was incorrectly printed in the Joint Appendix as "waived."

Thus, the Board found that Respondent had reached a business judgment, prior to unionization of its drivers, that it would eliminate its transport operations upon the occurrence of any unusual expense. The Board found also that Respondent honestly believed unionization of its drivers to be such an occurrence and that it executed its previous judgment upon this belief.

While finding that Respondent's claimed belief actually existed, the Board was of the opinion that the belief was based only upon the "surmise that it was about to be faced with higher wage costs." (J.A. 17a). The Court of Appeals recognized that the advent of the Union was a new economic factor and concluded that Respondent acted upon reasonably anticipated increased costs. Since the inquiry upon a charge of discrimination goes to the subjective motivation of the employer, the grounds of Respondent's belief are immaterial so long as it actually existed. However, the record amply supports the Court of Appeals' conclusion. Respondent had been told on January 14 by one of the drivers that they had joined the Union to obtain increased pay (J.A. 41a). The Teamsters' scale in this area for drivers was $2.53 per hour, almost double Respondent's rate of pay (J.A. 15a). The Teamsters' business agent who would have negotiated Respondent's contract and who had negotiated 75% of the Teamsters' contracts in the area (J.A. 50a), admitted that contracts with newly organized employers always result in increased costs to them (J.A. 51a) and that pay increases would undoubtedly have been sought for Respondent's drivers (J.A. 52a). Thus, Respondent's stated belief that it anticipated increased costs (J.A. 15a; 68a) was not only honest, but reasonable.

ARGUMENT

I

The Petition seeks to give this case importance by claiming an increase in the number of cases in which

employers claim economic motivation. Where such claims are mere pretext or subterfuge for discriminatory purposes, the Board may so infer, and often does. But here, the Board credited and accepted Respondent's evidence of the economic considerations which motivated its action.

The record belies Petitioner's argument that the Court of Appeals for the Sixth Circuit is usurping the Board's primary responsibility to weigh evidence and choose between conflicting inferences, and that it reversed the Board's findings of discriminatory motivation in this case merely because Respondent pointed to pre-existing facts "which might have supplied an economic motive." The Court of Appeals did not reject any inference made by the Board except the ultimate finding that the Act had been violated. It was compelled from the Board's own findings of fact to a conclusion of law that the undisputed facts demonstrated economic motivation instead of discriminatory motivation.

The Petition is based solely on the argument that unionization led Respondent to advance the date of a planned economic change. If this be true[3], it concerns only causation, not motivation. Under Section 8(a)(3) of the Act, the issue is whether the "real motive" and "true purpose" of the employer was to discourage union membership or activity by discrimination. *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17, 43–44.

The undisputed evidence is that Respondent's true reason for these discharges was simply the desire to

[3]As noted by the Court of Appeals, Respondent was not committed to continue its uneconomical transport operations until April 1, 1959. This was merely the outer limit. Elimination was to occur earlier if an accident, major overhaul or any other item of unusual expense intervened (J.A. 16a; 69a, 74a). One of these events could have occurred upon any date, including the date of January 20, if Respondent's fleet of transports had been on the road.

better its economic position and avoid increased costs in *any* form. If the predetermined signal of increased costs had been sounded by any other event, the transport operations would have been eliminated just as finally and effectively as they were upon this signal. This is not discrimination. Nor is it an intention to avoid the employer's duty to bargain. Respondent's only intention and purpose was to save expense—of any sort—and this intention was formed long before the Teamsters entered the scene.

This is not to say that any employer can justify any action which discourages Union membership merely because he believes that his employees' protected activity will cost him money. Had Respondent not already determined to eliminate the wasteful transport operation, its claim would be on a different footing. But surely an employer who has already condemned a marginal operation and who honestly and reasonably believes that unionization will increase its costs can take the same action upon this belief as he would take upon any other new economic factor. Respondent's motive is discriminatory only if it can be said that it would have continued its operations if confronted with the prospect of increased costs from some source other than union activity. The Board did not so find.

The Petition speculates that the advent of the Union did not necessarily mean increased costs.[4] If nothing else, the time and expense of meeting and negotiating

[4]For this conclusion, Petitioner relies upon testimony of two isolated instances in which the Teamsters had contracts for wage scales comparable to Respondent's and the business agent's testimony that the Union adjusted its demands to an employer's needs (J.A. 17a; 51a). The Petition fails to point out that this "adjustment" policy always seeks "a decent wage increase" for the employees (J.A. 51a). The Trial Examiner was less charitable than is the Petition. His surmise was that Respondent might have received "a reasonable wage demand." (J.A. 17a 18a).

with the Union was a legitimate factor to consider in evaluating whether to further continue the wasteful department. The unnecessary devotion of management's time to the troublesome trucking operation was a factor which had influenced its original decision. (J.A. 74a, 76a). Also, employers know, as the Court knows, that "the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action." *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17, 46. In any event, respondent acted upon an honest belief contrary to the Board's opinion. In determining motive, it is immaterial that a different state of mind might have been entertained. The Board cannot substitute its business judgment for Respondent's.[5]

If upon a record of this type, the Courts of Appeals must yield to the Board's bare conclusion of discriminatory motivation, then the Board will have absolute license to condemn employers as wrongdoers. *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474, does not require that reviewing courts rubberstamp ultimate facts which agencies have inferred from undisputed basic facts. Its holding is precisely to the contrary.

II

Petitioner seeks the issuance of the writ on the ground that the decision of the Court below conflicts with the decision of the Court of Appeals for the Tenth Circuit in *National Labor Relations Board v. Brown-Dunkin Co.*, (C.A. 10, January 19, 1961). A cursory examination of the *Brown-Dunkin* opinion reveals that there is no con-

[5] The Board's speculation that the Union's advent might not have increased costs is based upon a "wage adjustment" policy which may have been known to the Union (see Note 4, *supra*), but which was not known to Respondent. This evidence is therefore not material to Respondent's motives.

flict between the Tenth and Sixth Circuits. In fact, the Court there distinguished *National Labor Relations Board v. R. C. Mahon Company*, 269 F. 2d 44 (C.A. 6), one of the cases assailed by the Petition along with the present one, on the ground that there the "discontinuance of a part of the business was not prompted by an intention to avoid the Act, but resulted from legitimate business motives." (Petition, p. 21, n. 1). In *Brown-Dunkin*, the Board's finding of unlawful motivation was supported by evidence of anti-union hostility and coercive employer action. In *Brown-Dunkin*, there was no evidence that the employer had made an economic decision to eliminate the department prior to the advent of the Union. Subcontracting the operation actually *increased* the employer's costs. These are but a few of the obvious distinctions between that case and the present one.

It is suggested at page 11 of the Petition that *National Labor Relations Board v. Cape County Milling Co.*, 140 F. 2d 543 (C.A. 8) and *Williams Motor Co. v. National Labor Relations Board*, 128 F. 2d 960 (C.A. 8), are likewise in conflict with the present case. In the *Cape County Milling* case, the Board had found that the employer's change in operations was only a "temporary expedient" to avoid unionization and the change was preceded by threats and anti-union hostility. In *Williams Motor Company*, the employer's economic considerations were rejected by the Board as mere "subterfuge" for discriminatory motives.

Contrary to Petitioner's contention, examination of the decisions of Courts of Appeals other than the Sixth Circuit reveals that the cases nearest in point are in accord with the present case. See *Mt. Hope Finishing Company v. National Labor Relations Board*, 211 F. 2d 365 (C.A. 4); *Southern Oxygen Company v. National Labor Relations Board*, 213 F. 2d 738 (C.A. 4); *National Labor Relations Board v. Drennon Products Co.*, 272 F. 2d 23 (C.A. 5);

National Labor Relations Board v. Houston Chronicle Publishing Co., 211 F. 2d 848 (C.A. 5).[*]

In *Mt. Hope Finishing Co. v. National Labor Relations Board*, 211 F. 2d 365 (C.A. 4), the Court of Appeals for the Fourth Circuit took the same realistic approach to unionization as an economic factor affecting an unprofitable operation as did the Sixth Circuit in the present case. There, the employer relocated a textile plant after its unionization. The former plant had operated at a loss and the employer had considered the change before the advent of the Union. Unlike the present case, no definite decision had been made. In reversing the Board's findings of discriminatory discharges, the Court stated

> "... The glaring and undeniable fact which dominates all others in the record is that long before the union made its appearance the business was deteriorating and operating at a loss and that the managers of the enterprise were seeking a suitable location in the South. ... It is no answer to these undisputed facts to point out that prior to the advent of the union the managers had not definitely decided to cease operations in Massachusetts but were examining the advantages of a smaller experimental plant in the South, and that a final conclusion was not reached until after the union appeared. It was not uncertainty as to the existence of the problem but the gravity of removing a business from a location where it had prospered for half a century which justified cautious study before decision. The entrance of the union did not alleviate the trouble but served only to accentuate it, and it was obvious

[*]Petitioner attempts to distinguish *Houston Chronicle* on the ground that there the employer did not accelerate a prior decision because of the advent of the Union. The opinion indicates the contrary and expressly states: "It is the motive for the decision to change over that is material to the controversy rather than the motive for accelerating the change-over." 211 F. 2d 854.

to the company that if it could not make a go of the business prior to 1951, before the union was formed, it would be no better able to succeed after the pressure of the union was added to its existing difficulties. The union was not the cause that closed the business in Massachusetts." (211 F. 2d 371, 372).

One searches the decisions of the Circuit Courts of Appeals in vain for the conflict which the Petition asserts. There is not the slightest reason to believe that any Circuit would have reached a different result in the present case.

III

As a third ground for granting the writ the Petition suggests that the decision below is in conflict with the decision of this Court in *Order of Railroad Telegraphers v. Chicago & Northwestern R. Co.*, 362 U. S. 330. This case held only that the Railway Labor Act and Interstate Commerce Act do not make it unlawful for unions "to want to discuss with railroads actions that may vitally and adversely affect railroad jobs," and that the Norris-La Guardia Act prohibits injunction of a strike in support of such a demand. This case arose under other statutes which have different purposes and policy backgrounds from the National Labor Relations Act and decides a vastly different question from the one involved here.

The principle announced in *Order of Railroad Telegraphers* is not invoved here and was not applied by the Board. In fact, the Board has held under the National Labor Relations Act that the discontinuance of an operation by an employer is not a bargainable issue except as it may present questions of the future tenure of employees whose jobs are abolished. *Bickford Shoes, Inc.*, 109 NLRB 1346; *Butler Chemical Co.*, 116 NLRB 1041; *Shamrock Dairy, Inc.*, 119 NLRB 998; *Brown Truck &*

Trailer Mfg. Co., 106 NLRB 999. And where an employer has violated Section 8(a) (5) by refusing to bargain on this limited issue, the Board has held that it does not render the discharges unlawful under Section 8(c) (3) if the operational change was economically motivated. *Shamrock Dairy, Inc.*, supra; *Brown Truck & Trailer Mfg. Co.*, supra.

Furthermore, this record is not the proper vehicle for a decision by this Court that Respondent violated 8(a) 45) by failing to notify the Union of the operational change. When notified of the elimination of the Respondent's transport operation on January 20, the Teamsters Union did not request to bargain with Respondent upon either the changeover or the future tenure of the drivers, but instead elected to commence picketing and file unfair practice charges (J.A. 55a-56a). Respondent attempted to prove that the Union requested no further meetings after this one, but the Trial Examiner ruled that such evidence was immaterial (J.A. 56a). The basis of the refusal to bargain charge against Respondent was that it had discriminatorily discharged its drivers in violation of Section 8(a)(3) and that consequently their legal status as employees, and that of the Union as their representative, continued on January 20.[1] Respondent was never apprised that it was charged with an unlawful failure to bargain concerning the changeover, and the proceedings before the Board did not treat this as an issue.

CONCLUSION

None of the grounds for granting petitions for certiorari, as set forth in Rule 19 of the Revised Rules of

[1] The only facts alleged in support of the General Counsel's complaint were that Respondent "discharged . . . and refused to reinstate its employees . . . because of their membership in, and activities on behalf of, the Union, and because they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection." (J.A. 36a).

the Supreme Court, are present. There is no conflict among the Courts of Appeals and no conflict with a previous decision of the Supreme Court. The case presents no new point of law but merely involves the application of settled principles to undisputed facts.

For these reasons the petition for certiorari should be denied.

Respectfully submitted

D. L. LANSDEN
JAMES C. KIRBY, JR.
1200 American Trust Building
Nashville 3, Tennessee
Attorneys for Respondents

Of Counsel:
WALLER, DAVIS & LANSDEN
1200 American Trust Building
Nashville 3, Tennessee